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Lau Kok Loon @ Lau Say Siok v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–104–03 OF 2022
KAMALUDIN MD SAID, GUNALAN MUNIANDY AND LIM CHONG FONG JJCA
9 AUGUST 2023

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Criminal Procedure — Autrefois acquit — Applicant acquitted in court of law — Appellant charged under s 409 of Penal Code ('CBT case'), s 4(1)(b) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLA case') and s 132(2)(a) and (c) of Companies Act 1965 ('SSM cases') — Prosecution applied for discharge not amounting to acquittal for SSM cases — Sessions court granted discharge amounting to acquittal — Appellant applied to strike out CBT and AMLA cases under s 302 of Criminal Procedure Code — Whether appellant had been tried again on same facts — Whether s 302 of Criminal Procedure Code applicable — Criminal Procedure Code s 302

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The appellant was charged at the sessions court for the following offences: (a) criminal breach of trust under s 409 of the Penal Code ('the CBT case'); (b) money laundering under s 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA case'); and (c) eight charges under s 132(2)(a) and (c) of the Companies Act 1965 ('the SSM cases'). Subsequently, the prosecution had applied for discharge not amounting to acquittal of the SSM cases but the sessions court granted discharge amounting to acquittal instead. Consequent upon such order by the sessions court, the appellant had applied to strike out both the CBT and AMLA cases based on s 302 of the Criminal Procedure Code ('the CPC') but the application was dismissed. The present appeal was filed by the appellant against the refusal of the sessions court to strike out the charges preferred against the appellant on his autrefois acquit plea. It was common ground between the parties that the appellant was not tried again for the same offence that attracted s 302 of the CPC. Even if the word 'tried' was to be construed liberally, the critical issue to determine was whether the appellant had been tried again on the same facts that was seemingly not dealt with by the learned High Court judge.

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Held, dismissing the appeal:

(1) The court was mindful that the learned High Court judge whilst dismissing the appellant's appeal, aside from same offence and hence

A subject to art 7(2) of the Federal Constitution, concentrated also on the word 'tried' when construing s 302 of the CPC. He was not wrong if the word 'tried' was construed strictly based on the dictionary meaning of the word 'try' in *The Concise Oxford English Dictionary* (11th Ed) as 'investigate and decide (a case or issue) in a formal trial' because there was B no trial that had taken place in the SSM cases (see para 23).

(2) The indisputable facts before the court disclosed that the CBT and AMLA cases were instituted and ongoing before the SSM cases were instituted and thereafter terminated by way of discharge and acquittal of C the appellant. In this regard, the court found and held that s 302 of the CPC, particularly the phrase 'tried again', was only attracted if and only if the CBT and AMLA cases were instituted after the SSM cases were terminated but not vice versa as in the circumstances here. The court was fortified by illustration (a) of s 302 of the CPC read together with the D dictionary meaning of the word 'again' in *The Concise Oxford English Dictionary* (11th Ed) as 'once more' or 'in addition to what has already been mentioned' in interpreting the phrase 'tried again' in s 302 of the CPC (see paras 27–28).

(3) In conclusion, the appellant could not avail himself of and benefit from E the provision in s 302 of the CPC where the CBT and AMLA cases were already ongoing when the SSM cases were terminated that resulted in the acquittal of the appellant. The word 'tried' in the context of the CBT and AMLA cases must accordingly be also liberally construed and understood as charged in institution/commencement of trial process. Hence and F since the CBT and AMLA cases were not instituted/commenced after the termination of the SSM cases, s 302 of the CPC was therefore not attracted (see para 29).

[Bahasa Malaysia summary

G Perayu didakwa di mahkamah sesyen atas kesalahan-kesalahan berikut: (a) pecah amanah jenayah di bawah s 409 Kanun Keseksaan ('kes CBT'); (b) pengubahan wang haram di bawah s 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('kes AMLA'); dan(c) lapan pertuduhan di bawah s 132(2) (a) dan H (c) Akta Syarikat 1965 ('kes-kes SSM'). Selepas itu, pendakwaan telah memohon untuk pelepasan tidak berjumlah kepada pembebasan bagi kes-kes SSM tersebut tetapi sebaliknya mahkamah sesyen memberikan pelepasan berjumlah kepada pembebasan. Berikutan perintah tersebut oleh mahkamah sesyen, perayu telah memohon untuk membatalkan kedua-dua kes CBT dan I AMLA berdasarkan s 302 Kanun Tatacara Jenayah ('KTJ') tetapi permohonan tersebut ditolak. Rayuan ini difailkan oleh perayu terhadap penolakan mahkamah sesyen untuk membatalkan tuduhan-tuduhan yang dikenakan terhadap perayu atas permohonan 'autrefois acquit'. Pihak-pihak bersetuju bahawa perayu tidak diadili lagi untuk kesalahan yang sama yang menarik

penggunaan s 302 KTJ. Walaupun perkataan 'tried' itu ditafsirkan secara liberal, isu kritikal untuk penentuan adalah sama ada perayu telah diadili lagi berdasarkan fakta yang sama yang kelihatan tidak ditangani oleh Hakim Mahkamah Tinggi yang bijaksana.

Diputuskan, menolak rayuan:

(1) Mahkamah sedar bahawa hakim Mahkamah Tinggi yang bijaksana semasa menolak rayuan perayu, selain daripada kesalahan yang sama dan oleh itu tertakluk kepada perkara 7(2) Perlembagaan Persekutuan, juga menumpukan pada perkataan 'tried' apabila mentafsirkan s 302 KTJ. Beliau tidak salah sekiranya perkataan 'tried' ditafsirkan dengan tegas berdasarkan makna kamus perkataan 'try' dalam *The Concise Oxford English Dictionary* (11th Ed) sebagai 'investigate and decide (a case or issue) in a formal trial' kerana tidak ada perbicaraan yang berlaku dalam kes-kes SSM tersebut (lihat perenggan 23).

(2) Fakta-fakta yang tidak dapat dipertikaikan di hadapan mahkamah mendedahkan bahawa kes-kes CBT dan AMLA tersebut telah dimulakan dan sedang berlangsung sebelum kes-kes SSM dimulakan dan kemudiannya dihentikan dengan cara pelepasan dan pembebasan perayu. Dalam hal ini, mahkamah mendapati dan memutuskan bahawa s 302 KTJ, terutamanya frasa 'tried again', hanya terpakai jika dan hanya jika kes-kes CBT dan AMLA tersebut dimulakan selepas kes-kes SSM tersebut ditamatkan tetapi tidak sebaliknya seperti dalam keadaan di sini. Pendapat mahkamah diperkuat dengan ilustrasi (a) s 302 KTJ yang dibaca bersama dengan makna kamus perkataan 'again' dalam T*he Concise Oxford English Dictionary* (Edisi ke-11) sebagai 'once more' atau 'in addition to what has already been mentioned' dalam mentafsirkan frasa 'tried again' dalam s 302 KTJ (lihat perenggan 27–28).

(3) Kesimpulannya, perayu tidak dapat memanfaatkan dan mendapat faedah daripada peruntukan dalam s 302 KTJ apabila kes-kes CBT dan AMLA tersebut sedang berjalan semasa kes-kes SSM tersebut dihentikan yang mengakibatkan pembebasan perayu. Perkataan 'tried' dalam konteks kes-kes CBT dan AMLA tersebut juga mesti ditafsirkan secara liberal dan difahami sebagai dituduh dalam institusi/permulaan proses perbicaraan. Oleh itu dan memandangkan kes-kes CBT dan AMLA tersebut tidak diinstitusikan/dimulakan selepas penamatan kes-kes SSM tersebut, maka, s 302 KTJ tidak terpakai (lihat perenggan 29).]

Cases referred to

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831; [2014] 9 CLJ 289, FC (refd)

Jamali bin Adnan v PP [1986] 1 MLJ 162, SC (refd)

Sia Kim Yoke v PP and another appeal [1998] 5 MLJ 658; [1998] 1 CLJ Supp 74, HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 4(1)(b)
Companies Act 1965 (repealed by Companies Act 2016) s 132(2)(a), (2)(c)
Courts of Judicature Act 1964 ss 3, 60
Criminal Procedure Code s 302
Federal Constitution art 7(2)
Penal Code s 409

Appeal from: Criminal Appeal No WA-42(ORS)-5–05 of 2021 (High Court, Kuala Lumpur)

Devanandan S Subramaniam (with Rachel Lim Han Ying and Annesha Mary Koshy) (Chong + Kheng Hoe) for the appellant.
Mohd Khushairy bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal against the refusal to strike out the charges preferred against the appellant on his autrefois acquit plea.

[2] We heard the appeal on 12 July 2023 and unanimously dismissed the same.

[3] We now provide our grounds of judgment below.

BACKGROUND

[4] The appellant was on 28 November 2019 charged under s 409 of the Penal Code in the Kuala Lumpur Sessions Court Case No WA-62K-105–11 of 2019 for criminal breach of trust ('CBT case').

[5] Additionally, the appellant was on 8 July 2020 charged under s 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 in the Kuala Lumpur Sessions Court Case No WA-62K-104–07 of 2020 for money laundering ('AMLA case').

[6] The CBT case and the AMLA case were heard together and the trial

commenced on 27 July 2020 and thereafter continued on 5 and 7 August 2020 and 17 September respectively. The trial is part heard and unfinished to date.

[7] The appellant was subsequently on 6 January 2021 also charged with eight charges under s 132(2)(a) and s 132(2)(c) of the Companies Act 1965 in the Kuala Lumpur Sessions Court under Case Nos WA-63-18–10 of 2020, WA-63-119–10 of 2020, WA-63-120–10 of 2020 and WA-63-121–10 of 2020 ('SSM cases').

[8] However, the respondent on 17 December 2021 applied for discharge not amounting to acquittal of the SSM cases but the sessions court granted discharge amounting to acquittal instead.

[9] The respondent appealed against discharge amounting to acquittal order of the sessions court but the appeal was dismissed by the High Court on 9 September 2022. There was no further appeal lodged to this court by the respondent.

[10] As the result of the discharge amounting to acquittal order of the sessions court, the appellant on 24 March 2021 applied to strike out both the CBT case and AMLA case in the sessions court based on s 302 of the Criminal Procedure Code ('the CPC').

[11] The striking out application was heard on 26 April 2021 and dismissed by the sessions court on 7 May 2021.

[12] Consequently, the appellant on 18 May 2021 appealed against the same to the High Court.

IN THE HIGH COURT

[13] After hearing the submissions of the parties, the High Court dismissed the appellant's appeal on 11 March 2022 ('decision') and the learned High Court judge held as follows in the grounds of judgment:

> [25] Therefore, a person can plead autrefois acquit or autrefois convict in subsequent or separate criminal proceedings only where he is tried for the same offence of which he had been acquitted or convicted as the case may be.
>
> [26] However, he cannot so plead where he is tried for a different offence from that where he was acquitted, albeit based on the same facts or on facts arising from one series of acts so connected together as to form the same transaction.
>
> [27] To claim the protection under art 7(2) of the Federal Constitution, the applicant must have been acquitted of an offence by a court and must be charged with the same offence.

A [28] The learned author in the above-mentioned book also referred to the case of *R v Kupferberg* [1918] 13 Cr App R 166 where in construing what amounts to the same offence, AT Lawrence J said that 'the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients ...'.

B [29] In this case, since the CBT and the AMLA charges are different offences which ingredients are also different from the SSM charges, the applicant cannot avail himself of the provisions in s 302(1) of the CPC and art 7(2) of the Federal Constitution.

C [30] Further to this, the phrase 'tried' in sub-s (1) to s 302 implies that there was a hearing and determination of either guilt or innocence by the court. This is also the opinion held by the learned author in the book described above.

[31] This is unlike the present case under consideration where the SSM charges were not heard in the sense that no witnesses were called. The SSM charges were
D dismissed without a trial commencing

[14] The appellant was dissatisfied with the decision and thus appealed to this court. In the meantime, the trial of the CBT case and AMLA case in the sessions court was stayed.

E

FINDINGS OF THIS COURT

Preliminary objection

F **[15]** Before us, the respondent at the onset raised a preliminary objection that the appeal is incompetent because the decision is not an appealable decision by virtue of s 3 of the Courts of Judicature Act 1964 that provides:

'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally
G dispose of the rights of the parties

In support of its proposition, the respondent relied on the case *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831; [2014] 9 CLJ 289 (FC) where Raus Sharif PCA (later CJ) held as follows:

H [39] In this instant case the appellant had applied before the High Court to quash the charges and order an acquittal against him. The application was dismissed. The appellant had also applied before the sessions court for the charges to be quashed and prayed that a discharge not amounting to acquittal to be ordered against him. The application was also dismissed. The way we perceive it, the orders of the courts
I below would connote that the matter should proceed for trial as the charges preferred against the appellant still stand. Clearly the decision not to strike out the charges before the commencement of the trial as was done in this instant case does not amount to disposal of the rights of the parties. Since the order gives no final decision on the matters in dispute, it is not a 'decision' within the definition under s 3 of the CJA and therefore is not appealable'.

[16] The appellant retorted that a decision in respect of discharge and acquittal is appealable because it disposes the rights of the parties following the case of *Sia Kim Yoke v Public Prosecutor and another appeal* [1998] 5 MLJ 658; [1998] 1 CLJ Supp 74 where Suriyadi Halim Omar J (later FCJ) held as follows:

> The plea of autrefois convict is a complete bar to any repeated indictment and fell within the perimeter of substantive law, which is the relevant law that creates, defines and regulates the rights of the parties. Therefore the issue in the instant case was a matter of substantive law and not a procedural question that warranted a procedural ruling from a subordinate court in the course of a criminal trial. In the circumstances the order was appealable ...
>
> ...
>
> Under s 303 of the Criminal Procedure Code the plea of a previous acquittal or conviction may be pleaded orally or in writing, by merely stating that he is not liable to be tried again by virtue of the latter doctrines. It is statutorily provided that a preferential treatment is given to the plea of autrefois convict or autrefois acquit in that these doctrines shall be tried and disposed of before the trial proper or other issues do get underway or are required to be resolved.
>
> ...
>
> As said above, at para 241 of *Halsburys Laws of England* , that 'if shown to be well founded, such a plea operates as a bar to the indictment'. It will be an act of unqualified unfairness if the respondent were required to endure the unnecessary and excruciating hearing, only to be acquitted at the end of the day by virtue of the strength of that plea. It is made even more unforgiveable when that predicament is occasioned by a ruling that that plea may only be allowed to be aired or considered at the tail end of the trial. To pursue that course of action surely is a travesty of justice when the very purpose of that doctrine is to ensure that the accused does not have to suffer that humiliating indignity, apart from saving him from being convicted of the same offence.

[17] After due deliberation on the respective rival contentions of the parties, we overruled the respondent's preliminary objection. In this regard, we find that the respondent failed to raise this objection at the material time during the appeal in the High Court. The objection lodged now pertains to the decision which, in our view, has for all intents and purposes disposed the rights of the parties in respect of the appeal.

Substantive merits

[18] The appellant strenuously contended before us that the learned High Court judge erred in confining the matter only to that the appellant has neither been tried nor discharged and acquitted for the same offence. In other words, the learned High Court judge was wrong in merely distinguishing that the offences in the SSM cases where the appellant was discharged and acquitted are different from the offences in the CBT case and AMLA case; hence s 302 of the

CPC is not attracted.

[19] According to the appellant, the learned judge materially omitted to address his mind, albeit that the SSM cases as well as the CBT case and AMLA case are all different offences, they arose and are based on the same facts; therefore s 302 of the CPC is nonetheless attracted following *Jamali bin Adnan v Public Prosecutor* [1986] 1 MLJ 162.

[20] The respondent candidly conceded that it has admitted that the SSM cases as well as the CBT case and AMLA case arose and are based on the same facts before the sessions court in the striking out application. That notwithstanding, the respondent emphasised to us that the respondent merely sought for discharge not amounting to acquittal of the SSM cases from the sessions court because the CBT case and the AMLA case were already instituted and ongoing in the other sessions court. Consequently, s 302 of the CPC is not attracted.

[21] For purposes of this appeal, the powers conferred upon us in s 60 of the Courts of Judicature Act 1964 are wide and to be exercised as it seems just to us.

[22] It is accordingly helpful to reproduce s 302 of the CPC which reads:

> 302 Person once convicted or acquitted not to be tried again for same offence
>
> (1) A person who has been *tried* by a Court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal remains in force, *not be liable to be tried again* for *the same offence* nor on *the same facts* for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167.
>
> (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection 165(1).
>
> (3) A person convicted of any offence constituted by any act causing consequences which, together with that act, constituted a different offence from that of which he was convicted, may be afterwards tried for that last-mentioned offence, if the consequences had not happened or were not known to the Court to have happened at the time when he was convicted.
>
> (4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding the acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section. **A**

ILLUSTRATIONS

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged upon the same facts with theft as a servant, or with theft simply, or with criminal breach of trust. **B**

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with and tried for robbery. **C**

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is tried and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B. **D**

(e) A is charged and convicted of voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts unless the case comes within subsection (3) of this section. (Emphasis added.) **E**

[23] We are mindful that the learned High Court judge whilst dismissing the appellant's appeal, aside from same offence and hence subject to art 7(2) of the Federal Constitution, concentrated also on the word 'tried' when construing s 302 of the CPC. He was not wrong if the word 'tried' is construed strictly based on the dictionary meaning of the word 'try' in *The Concise Oxford English Dictionary* (11th Ed) as 'investigate and decide (a case or issue) in a formal trial' because there was no trial that had taken place in the SSM cases. **F**

[24] However, the appellant implored us to construe the word 'tried' liberally as trial process which included termination of the trial by way discharge and acquittal. **G**

[25] Before us, it is common ground between the parties that the appellant was not tried again for the same offence that attracted s 302 of the CPC. **H**

[26] Even if the word 'tried' is to be construed liberally, the critical issue is whether the appellant has been tried again on the same facts that was seemingly not dealt by the learned High Court judge. **I**

[27] The indisputable facts before us however disclose that the CBT case and AMLA case were instituted and ongoing *before* the SSM cases were instituted and thereafter terminated by way of discharge and acquittal of the appellant.

[28] In this regard, we find and hold that s 302 of the CPC, particularly the phrase ('tried again'), is only attracted if and only if the CBT case and AMLA case are instituted *after* the SSM cases are terminated but not vice versa as in the circumstances here. We are fortified by illustration (a) of s 302 of the CPC read together with the dictionary meaning of the word 'again' in *The Concise Oxford English Dictionary* (11th Ed) as 'once more' or 'in addition to what has already been mentioned' in interpreting the phrase 'tried again' in s 302 of the CPC.

[29] Simply put, we find that the appellant cannot avail himself of and benefit from the provision in s 302 of the CPC where the CBT case and AMLA case are already ongoing when the SSM cases were terminated that resulted in the acquittal of the appellant. The word 'tried' in the context of the CBT case and AMLA case must accordingly be also liberally construed and understood as charged in institution/commencement of trial process. Hence and since the CBT case and AMLA case were not instituted/commenced after the termination of the SSM cases, s 302 of the CPC is therefore not attracted.

[30] By our above interpretation and findings in paras [23] and [28]–[29] above, we therefore find there is no appealable error here that warranted our intervention.

CONCLUSION

[31] It is for the foregoing reasons that we dismissed the appeal as so ordered.

Appeal dismissed.

Reported by Dzulqarnain Ab Fatar